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## Country Report: The Netherlands

Jonathan Verschuuren\*

### Introduction

The most important, and most debated, recent development within the field of environmental law in the Netherlands is the enactment of the Crisis and Recovery Act (CRA) in March 2010. The Netherlands legislature enacted this special Act containing literally hundreds of articles that all are meant to speed up decision-making on a wide variety of activities, hoping that after the crisis is over, all of these projects can immediately be carried out, without any delay caused by legal procedures in court or elsewhere. The CRA has four main elements: special provisions for specific projects; experimental rules on 'development areas'; special provisions for residential construction projects; and provisions simplifying and streamlining 20 existing Acts. Each of these are considered in turn below.

### Special Provisions for Specific Projects

Most attention, both politically, in the media, and in legal scholarship, goes to the first chapter of the CRA. This chapter applies to 70 projects of national importance listed in annex II and to more generally described categories of projects in annex I. The provisions that apply to these projects aim at a significant simplification of the decision-making process so that the projects can be carried out as soon as possible, thus stimulating the recovery process of the economy. The projects on the list all are large developmental projects, such as the extension of large industrial sites, large scale wind parks, large urban development plans, main infrastructure (highway,

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railway, and airport extensions, renovation of bridges). General categories of projects include infrastructural projects, water management projects and sustainable energy projects. These provisions expire in 2014.

Changes made to existing administrative law in order to speed up decision-making on these projects include (not exhaustive):

- Decentralized government bodies cannot appeal. This is contrary to existing administrative law. Unlike in some other countries, it is common practice that government bodies appeal decisions of other government bodies.
- Small substantive illegalities can be passed if interested persons are not affected by these.
- The length of processes is curtailed. Courts have to apply the - already existing - fast procedure that originally was designed for preliminary suspension cases.
- The so-called 'relativity'-principle is introduced, meaning that claimants can only invoke rules that are specifically meant to protect their interests. Under regular Dutch administrative law, once you are accepted as an interested person, you can have the entire decision reviewed by court.
- When an environmental impact assessment (EIA) is required, it is neither necessary to assess alternatives, nor is an advice of the EIA committee needed. Under Dutch environmental law, an EIA has to include an assessment of alternatives, such as other routes for a road or other locations for a harbour extension. The EIA committee is an independent scientific committee that advises on the scientific quality of the draft-EIA.
- The so-called *lex silencio positivo* principle is introduced on a wider scale. According to this principle, a permit is legally deemed to be issued in case the competent authority does not take a decision on an application for a permit on time.

### **Experimental Rules on 'Development Areas'**

The second important element of the CRA is the introduction of an experimental set of rules on 'development areas'. Under Art. 2.2, the central government can designate development areas, either urban or industrial areas. In these areas, the 'bubble' concept is applied - environmental standards only apply to the entire area, and no longer to individual polluters. The local authority has to achieve a 'good environmental quality' without having to apply the same environmental standard to

each individual source of pollution. This opens up the possibility to compensate polluting activities with clean activities in the area, thus creating additional 'pollution rights' within the overarching environmental quality standard. Local authorities can also redistribute environmental rights within the development area so as to enable development without impairment to the overall environmental quality. The basis for such a redistribution of pollution rights is the newly created instrument of the 'development area plan'. To enable the experiment to be executed, the CRA makes it possible to deviate from a whole series of environmental and spatial planning laws. The administrative rules for specific projects mentioned above apply to decisions concerning activities in development areas.

This is experimental legislation: the central government designates the experimental areas and will monitor the results. An experiment can last up to ten years, with a possible extension of up to five years. The provisions of the CRA on development areas expire in 2014. This means that an experiment can last until 2029.

### **Special Provisions for Residential Construction Projects**

The third main element of the CRA is the introduction of the 'one stop shop' principle for the development of new residential areas, comprising anything between 12 and 2000 new houses. Although only applicable to the construction of new residential areas, the provisions of this element are quite far-reaching. Practically all legal provisions that require decisions to be taken by any government authority are not applicable for these projects. These can include provisions in a wide variety of laws and regulations in the field of the environment, nature conservation, spatial planning, water management, infrastructure, etc. The only exceptions are provisions in nature conservation law and law protecting archaeological sites, both sets of rules with an international and EU background. Instead of applying all of these regular pieces of legislation, there is only one 'project decision' to be made by the local city council. When taking the project decision, the local council has to take into account the norms that are in the laws and regulations that were declared inapplicable. Thus, the 'one stop shop' principle is introduced into Dutch law: the initiator of a building project only has to go to one authority, and that one authority reaches a decision on its own and provides the applicant with one integrated permit. Again, these provisions expire in 2014.

## **Provisions Simplifying and Streamlining 20 Existing Acts**

The last element of the CRA that I want to highlight comprises by far the biggest part of the Act. The remainder 40 pages of the CRA hold an seemingly endless list of modifications, big and small, of existing rules in a wide variety of laws, mainly in the field of the environment and energy. The big difference to the other three central elements, is that the amendments in existing environmental and energy law do not expire in 2014. Examples of the changes are the introduction of rules to simplify and speed up decision-making on the construction or extension of sustainable energy installations, and the relaxation of various nature conservation rules

## **Analysis of the Criticism Greeting the New Law**

### *It is not always the law that causes delays*

Delays are often caused by a lack of administrative or political competence to reach a decision that gets a wide support, often simply because the project is extremely complicated. Many authors argue that the Act will, ultimately, not lead to a more speedy process, but most probably even to further delays because of the fact that the Act was drafted in a hurry and many things have not been thought through. Given the knowledge we now have on decision-making in complex situations, it is very likely that some of the amendments made will be counterproductive. Decision-making on big projects needs time. The feasibility has to be studied, alternatives will have to be looked into, environmental and other impacts will have to be studied, including possible side-effects, and the involvement of stakeholders needs careful attention so as to achieve political and social acceptance.

### *The Act curtails citizens' rights in legal procedures*

The right to appeal is limited in various ways as is described above, especially through applying the relativity principle, thus limiting the arguments that appellants can bring forward. First and foremost, interested persons who have standing are no longer allowed to have the entire decision reviewed. And even when they do only invoke rules that are particularly meant to protect their interests, then small illegalities can be passed, rendering their appeal virtually ineffective. Obviously, much depends on the way courts are going to apply these new provisions. Both the question whether a certain legal rule is meant to protect the interests of the individual or NGO

involved, and the question whether the illegality is small and can be passed, leaves plenty of room for manoeuvre for the court.

*There are frequent potential infringements of international and EU law*

There are at least five elements in the CRA that do or may, depending on how the provisions will be applied in practice, conflict with international law and EU. Such a conflict is legally prohibited under the Dutch Constitution and under the EU Treaty. As a consequence, courts will have to directly apply international or EU law instead of the CRA. Conflicting elements are the possibility to pass small illegalities (taking decisions against EU-law is, legally, not possible), limiting public participation and access to justice (this may be contrary to the UN/ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and EU Directives implementing this Convention), and several infringements of the EU Environmental Directives (on EIA Directive, Biodiversity, and others).

*The Act reduces the level of environmental protection*

As a consequence of the Act, the level of environmental protection in the Netherlands is reduced, both when it comes to procedural safeguards, and as far as the substance is concerned. The first chapter of the Dutch Constitution, containing fundamental rights, has a right to environmental protection. Article 21 states that a duty to care for the environment rests with all authorities. In the explanatory memorandum to the Constitution, and in literature, it is argued that one of the functions of Article 21 is to prevent governments from reducing the standard of environmental protection. Unfortunately, there is no constitutional court in the Netherlands with the power to test legislation against the Constitution, so this provision remains without teeth.

## **Conclusion**

The Dutch legislature has enacted the CRA in an attempt to combat the financial and economic crisis. The Act is an example of 'occasional' (or ad hoc, or impulsive) legislation. There is a sense of urgency enabling the legislature to implement innovations and long time pending amendments to existing legislation. Most issues, however, have not been fully thought through. Legal scholars predict that the many

legal questions that will arise when implementing the CRA will slow down projects, rather than speed them up. There are frequent potential clashes with EU law that will be discussed in court and that most probably will not all be decided in favor of the CRA. Stakeholders are creative. They will find other ways to defend their interests, pursuing other legal pathways, thus obstructing decision-making that they feel is illegal. Negative aspects of the Act are the reduction of citizens' rights and the sole emphasis on speeding up decision-making. These elements bear the risk that carefulness is lost where it is needed most: in complex cases where the stakes are high. Careful research into the pros and cons of the project and into potential alternatives, advice given by various advisory bodies, consultations with all relevant stakeholders (including local authorities, NGOs, and individual residents) all contribute to the success of the project. These are exactly the things that are limited in the CRA.

Nevertheless, the CRA does contain some interesting experiments, such as the designation of so called 'development areas' and the introduction of 'project decisions'. These new instruments may lead to a more integrated decision-making, hopefully without tunnel vision with the competent authority. Also the set of rules enabling a swift conversion from fossil fuel energy production to green energy production is a positive element of the CRA.